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No. 85-1314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,

Petitioner,

vs.

CHARLES F. EDDINGFIELD, M.D.; EDWARD MCKENNEY, D.O.; and VASANT F. PAWAR, M.D.,

Respondents.

BRIEF OF RESPONDENT, CHARLES F. EDDINGFIELD, M.D. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Petitioner's STATEMENT OF THE CASE is essentially accurate except for the omission of certain procedural issues which support the decision below without regard to the questions presented. The following STATEMENT of Respondent, Eddingfield, presents those issues.

The deceased minor, Lacey Hammel was a resident of the State of Illinois, prior to and at the time of her death. Her mother, Krista Wilsey, an Iowa resident, filed a Complaint in the United States District Court for the Central District of Illinois and simultaneously petitioned that Court to name her as

special administrator of the decedent's estate for the purpose of bringing the action under Ill.Rev.Stat. ch. 70, §2.1 (1983). (A-22).[1] The dismissal of that Complaint is the subject of this review. Another statutory beneficiary, the father of the deceased minor, Jeffrey Hammel, an Illinois resident, thereafter filed an identical action in the state court pursuant to the same statute. (A-8-9).

Eddingfield has consistently maintained that under Illinois law[2] Wilsey, as a non-resident, cannot qualify as "administrator" for the purpose of maintaining the action. In this regard it has also been his contention that jurisdiction is lacking to consider an appointment which serves as a prerequisite to the creation of the diversity of citizenship required for the jurisdiction upon which the claim is based. The District Court agreed (A-8-9), and even Judges Posner, Eshbach and Easterbrook, while espousing a conflict among the circuits on other issues, recognized that the Plaintiff's capacity to sue would ultimately control the jurisdictional question (A-6-7).

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[1] All citations are to the Appendix which accompanies Wilsey's Petition for Certiorari.

[2] See Ill.Rev.Stat., ch. 110½, §9-1 (1983) which provides:

> "Who may act as administrator. A person who has attained the age of 18 years and is a *resident of this state,* is not of unsound mind, is not an adjudged disabled person as defined in this Act and has not been convicted of a crime rendering him infamous is qualified to act as administrator." (emphasis supplied).

REASONS FOR DENYING THE WRIT

Summary of Argument

The decision below is correct without reference to the questions presented by the Petitioner. As recognized by the district court and the courts of appeal, substantive jurisdictional questions remain even if the Petitioner technically qualifies as a proper party for diversity purposes. At the outset the district court must exercise probate jurisdiction for the purpose of creating diversity of citizenship. In this regard a non-resident cannot qualify under Illinois law as administrator and therefore the Petitioner's citizenship precludes the status essential for her to maintain the litigation. Recognition of these fundamental propositions is a prerequisite to any consideration of the question presented, and it is therefore neither necessary nor likely that this Court would reach the alleged "conflict".

I. The District Court Would Be Required To Exercise Non-Existent Probate Jurisdiction To Create The Diversity Jurisdiction Claimed.

This action was not commenced by a fiduciary previously appointed and acting in that capacity under state law. Rather, intervention of the district court was first sought to invest the Plaintiff with authority to sue and thereby to create a statutory claimant whose residence might then be considered for the purposes of diversity jurisdiction. The viability of this approach presupposes the invocation of an existent federal probate jurisdiction antedating the existence of a "controversy" between "citizens of different states".[3] Jurisdiction of this type is not vested in the federal courts.

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[3] 28 U.S.C. §1332 (1976).

The Judiciary Act of 1789 (ch. 20, §11, 1 Stat. 78) conferred on the federal courts, in diversity cases, concurrent jurisdiction over 'all suits of a civil nature at common law or in equity'. Its current counterpart, 28 U.S.C., §1332(a), vests jurisdiction in the federal courts over 'all civil actions'. However, the language employed was intended to be synonymous with that of its predecessor.[4] "Suits of a civil nature at common law or in equity"' related to matters cognizable in the common law or chancery courts of England. Probate matters were within the exclusive jurisdiction of the ecclesiastical courts and therefore were not included within the judiciary act's grant of jurisdiction. The federal courts have therefore refused to entertain matters which are strictly probate in nature and have expressed a general reluctance to act in instances which would interfere with pending probate proceedings.[5]

The exercise of probate jurisdiction under circumstances such as those here presented would also be inappropriate as no "civil action" was pending at the time appointment was sought.[6] In the limited context of "infants or incompetent persons" Rule 17[7] permits the Court to appoint a "guardian ad litem". Ap-

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[4] Reviser's Note to 28 U.S.C. §1332 (1976).

[5] *Markham v. Allen,* 326 U.S. 490, 494 (1946) wherein it is stated:

> "It is true that the federal court has no jurisdiction to probate a will or administer an estate,..." *Id.*

[6] As the claim is one which can be maintained only by a statutory representative, federal jurisdiction must inevitably await action by the state court having probate powers. Not only does the Wrongful Death Act require the sequential qualification of a fiduciary who may then bring the action, the determination of whether a particular putative plaintiff qualifies in that respect is beyond the purview of federal jurisdiction. For example, upon what basis might the District Court exercise jurisdiction to resolve conflicting claims for representative capacity between: (1) applicants from the same state, or (2) applicants from different states?

[7] Fed. R. Civ. P. 17(c).

pointments under that rule are for the purpose of facilitating, as opposed to investing the Court with jurisdiction. Thus, it is the substantive interests of the minor or incompetent, for whom appointment is sought which control for diversity purposes and not those of the guardian. *Morgan v. Potter,* 157 U.S. 195 (1895); 3A J. MOORE & J. LUCAS, *Moore's Federal Practice* §17.26 (2d ed. 1985). Were the rule otherwise then by its appointment the Court would either create or destroy the jurisdiction which it exercised.

This is consistent with the requirement that the party in whose name suit is brought for diversity purposes must have a preexisting substantive interest in the assets involved and therefore in the outcome. *Kramer v. Caribbean Mills,* 394 U.S. 823 (1969). As otherwise expressed, litigants cannot "manufacture jurisdiction by vesting the claim in a nominal party for that purpose.[8] Where the action is one which must be brought by a fiduciary then that representative's status must be determined by considerations other than the selection of a forum. *Navarro Savings Association v. Lee,* 446 U.S. 458 (1980). There the individual trustees of a Massachusetts business trust served in that capacity under Massachusetts law independent of litigation

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[8] *Kramer v. Caribbean Mills* involved an assignment of claims to create jurisdiction contrary to 28 U.S.C. §1359. In condemning the attempt the Court made the following distinction between the consensual assignment of a claim and the intervention of the state courts in instances where a personal representative is appointed:

> "Cases involving representatives vary in several respects from those in which jurisdiction is based on assignments: (1) in the former situation, some representative must be appointed before suit can be brought, while in the latter the assignor normally is himself capable of suing in state court; (2) under state law, different kinds of guardians and administrators may possess discreet sorts of powers; and (3) all such representatives owe their appointment to the decree of a state court, rather than solely to an action of the parties....". *Kramer,* 394 U.S. at 828 n. 9.

which was subsequently brought in the Northern District of Texas. Of particular significance to the affirmance of diversity was the declaration of trust which "authorized the trustees to take legal title to trust assets, to invest those assets for the benefit of shareholders and to sue and be sued in their capacity as trustees".

In the instant case the Petitioner is confronted by an obvious dilemma. If she urges that the role of "special administrator" is nominal and therefore falls within the type of ancillary action contemplated by Rule 17 then her lack of substantive involvement in the subject matter of the litigation precludes jurisdiction. *Kramer,* 394 U.S. 823; *Navarro Savings Association,* 446 U.S. 458; *Morgan,* 157 U.S. 195. On the other hand, if a "special administrator" possesses the authority and control requisite for jurisdiction then appointment by a state court having probate powers is mandatory.[9] Each of these alternatives is mutually exclusive and each defeats jurisdiction. Each also involves a threshold question requiring resolution well in advance of the questions presented by the Petitioner.

II. The Non-Resident Fiduciary Tendered As Plaintiff In This Cause Cannot Qualify In That Capacity Under Illinois Law.

The district court properly found that the fiduciary representative contemplated by the Illinois Wrongful Death Act,[10] must be an Illinois resident. This determination was mandated by the clear equation between "special administrator" under the Wrongful Death Act and "administrator" as defined in the Illinois Probate Act. Specifically, Section 9-1 of the latter provides:

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[9] This is particularly true as a court having probate powers would thereafter be involved in protecting the interests of the decedent's heirs, among whom were Illinois residents.

[10] Ill.Rev.Stat. ch. 70, §2.1 (1983).

> "Who may act as administrator. A person who has attained the age of 18 years and is a *resident of this state,* is not of unsound mind, is not an adjudged disabled person as defined in this Act and has not been convicted of a crime rendering him infamous is qualified to act as administrator." (emphasis supplied).

The term "administrator", whether or not categorized as "special", contemplates a fiduciary whose statutory obligation is to act on behalf of a specified class of beneficiaries subject to the authority of a court having appropriate jurisdiction over the collection, maintenance and distribution of the *res* in question. Contrary to the argument of Wilsey, the State of Illinois has a manifest interest in the qualification of those who would serve in that capacity, particularly where, as here, the decedent was a resident of Illinois and beneficiaries of the administration include Illinois residents. *Lowrence v. Central Illinois Public Service Co.,* 161 F.Supp. 656 (E.D. Ill. 1958).

The similarity in application of the term "administrator" between the Wrongful Death and Probate Acts is nowhere better found than in the concluding clause of Section 2.1 of the former where the involvement of a minor as beneficiary requires "supervision of the probate division of the court if the circuit court has a probate division". If the legislature intended to abolish the constraints of regulated fiduciary responsibility by vesting the affairs of Illinois decedents, and their respective beneficiaries, in "administrators" beyond the reach of the Illinois courts the foregoing language would have no application. On the other hand, if the act contemplates the exercise of probate jurisdiction through the "circuit court" then the maintenance of this action in the federal courts, subject to the appointment of a subsequent fiduciary to "administer" and "distribute" any proceeds recovered, is nothing more than an exercise in duplicative forum shopping. *Bass v. Texas Power & Light Co.,* 432 F.2d 763 (5th Cir. 1970), *cert. denied,* 401 U.S.

975 (1971); *Rogers v. Bates,* 431 F.2d 16 (8th Cir. 1970); *O'Brien v. Avco Corp.,* 425 F.2d 1030 (2d Cir. 1969). As otherwise expressed by the court in *Betar v. DeHavilland Aircraft of Canada, Ltd.,* 603 F.2d 30 (7th Cir. 1979), *cert. denied,* 444 U.S. 1098 (1980) in reference to the foregoing decisions:

> "These decisions have applied Section 1359 to defeat diversity jurisdiction based on the appointment of representatives with *only nominal duties for the purpose of creating diversity of citizenship.*" *Id.,* 34. (emphasis supplied).

The rule of *Kramer v. Caribbean Mills* and *Navarro Savings Association v. Lee,* depends in large part upon the weight given state law in its recognition of the status of fiduciaries whose existence and qualification derives from substantive relationships apart from the maintenance of litigation. This is the same theme which pervades the authorities from other circuits relied upon by the plaintiff. *Bettin v. Nelson,* 744 F.2d 53 (8th Cir. 1984); *Bianca v. Parke-Davis Pharmaceuticals Division,* 723 F.2d 392 (5th Cir. 1984); *Hackney v. Newman Memorial Hospital,* 621 F.2d 1069, 68 ALRF 456 (10th Cir. 1980), *cert. denied,* 449 U.S. 982 (1980); *Gross v. Hougland,* 712 F.2d 1034 (6th Cir. 1983), *cert. denied,* 465 U.S. 1025 (1983); *Field v. Volkswagon, A.G.,* 626 F.2d 293 (3rd Cir. 1980). In every instance deference was accorded state law recognition of the qualification and role played by the personal representative in question. Here the plaintiff self proclaims her fiduciary status without the imprimatur of state law, and under circumstances where she could not qualify if sanction had been sought. It is therefore respectfully submitted that recognition of federal jurisdiction in this case would be rest upon the impermissible fabrication of a non-qualifying fiduciary in derogation of Illinois law.

CONCLUSION

Before the Petitioner's domicile, as opposed to that of the decedent's heirs, may be considered for diversity purposes she must first be a qualified and duly appointed fiduciary. As the district court found, Illinois law would not permit Wilsey to serve in the capacity sought. Even assuming qualification her appointment would require the exercise of a non-existent federal probate jurisdiction. These are preliminary considerations the resolution of which effectively precludes review of the questions here presented.

Accordingly, the Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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